(3)

PAGE NO.....1.....

IN THE HONOURABLE HIGH COURT OF CHHATTISGARH AT BILASPUR.

CRIMINAL APPEAL NO. 1021 /2001

APPELLANTS ACCUSED IN JAIL. : 1. Vijaya Kumar S/o. Ganga Ram age 19 years, Carpenter, R/O. Village Parpa ,Patelpara P.S. Fraizerpur,Distt.Bastar.

2. Bhuvneshwar S/o. Sadhu Ram, age 19 years, Carpanter R/O. Village Parpa ,Dongaripara P.S. Frazerpur,Distt. Bastar.

V E R S U S

RESPONDENT : The State of Chhattisgarh.

CRIMINAL APPEAL UNDER SECTION 374 (2) OF THE CODE OF CRIMINAL PROCEDURE.

A.F.R.

HIGH COURT OF CHHATTISGARH AT BILASPUR

Single Bench: Hon'ble Shri **Dilip Raosaheb Deshmukh, J.**

Criminal Appeal No.1004/2001

Kirtiwas

Vs.

State of Chhattisgarh

&

Criminal Appeal No.1021/2001

Vijay Kumar and another

Vs.

The State of Chhattisgarh

Post for Judgment : 25.03.2006

Sd/-
Dilip Raosaheb Deshmukh
Judge

A.F.R. (31)

HIGH COURT OF CHHATTISGARH AT BILASPUR

Single Bench: Hon'ble Shri **Dilip Raosaheb Deshmukh, J.**

Criminal Appeal No.1004/2001

Kirtiwas

Vs.

State of Chhattisgarh

&

Criminal Appeal No.1021/2001

Vijay Kumar and another

Vs.

The State of Chhattisgarh

Shri Prafulla Bharat, Counsel for the appellants.

Shri U.K.S.Chandel, P.L. for the State.

JUDGMENT

(Delivered on 25th day of March 2006)

1. In *Sessions case* No.458/2000 Shri C.B.Bajpai, learned 3rd Additional Sessions Judge, Bastar place Jagdalpur vide judgment dated 13.10.2001 convicted the appellants Vijay and Bhuvneshwar under Sections 363, 366, 376 (2) (g) and 342 I.P.C. and sentenced them to undergo R.I. for five years and a fine of Rs.500/- and in default to undergo simple imprisonment for four months under Section 366 I.P.C., to under undergo R.I. for ten years and a fine of Rs.1000/- and in default to undergo simple imprisonment for eight months under Section 376 (2) (g) I.P.C. and to undergo R.I. for six months under Section 342 I.P.C. and further convicted appellant-

(32)

Kirtiwas under Sections 363 and 366 I.P.C. and sentenced him to undergo R.I. for five years and a fine of Rs.500/- and in default to undergo simple imprisonment for four months under Section 366 I.P.C.

2. Being aggrieved by the above mentioned judgment, the appellants-Vijay and Bhuvneshwar have preferred Criminal Appeal No.1021/2001 and appellant-Kirtiwas has preferred Criminal Appeal No.1004/2001 which are being disposed of by this common judgment.

3. Briefly stated the prosecution story is that on 12.07.2000 at about 10.45 A.M. the prosecutrix, a girl aged about 14 years and a student of Class 7th, was coming to the school with her cousin-sister Jaishree P.W.6. When they reached near the *Aanganbadi* it started raining. Both girls decided to return home. While returning, on the road near the burial ground, they saw the appellants Vijay and Bhuvneshwar standing on the road. No sooner the girls bypassed the above named appellants, appellant-Bhuvneshwar came from behind and held the prosecutrix and gagged her mouth. Appellant Vijay held Jaishree P.W.6. Appellant Kirtiwas also came there. He held the prosecutrix by her legs, the appellant-Bhuvneshwar held her by her hands while the appellant-Vijay lifted Jaishree P.W.6 and the appellants thus took both girls to the house of Bhuvneshwar. After leaving the prosecutrix at the house of appellant-Bhuvneshwar, appellant-Kirtiwas went away. Jaishree P.W.6 was left outside the house after being threatened by appellants-Vijay and Bhuvneshwar that if she shouted they would kill her. Jaishree P.W.6 remained outside the house. Appellants-Bhuvneshwar and Vijay went inside the house and after undressing the prosecutrix, undressed themselves and committed rape on the prosecutrix one after another. Appellant-Bhuvneshwar was the first to commit rape on the prosecutrix while she was lying on the cot. Thereafter, appellant-Vijay committed rape

(33)

on the prosecutrix. At this juncture, Jaishree P.W.6, who was outside the house, shouted "brother is coming". Hearing her shouts, the appellants dressed themselves and ran away. Pradeep P.W.7, brother of the prosecutrix came to the house of Bhuvneshwar. The prosecutrix told him that the appellants-Vijay and Bhuvneshwar had committed rape on her. Pradeep P.W.7 asked the two girls to go home and went in search of the appellants.

4. The prosecutrix P.W.5 and Jaishree P.W.6 went home and informed Hariram P.W.3, father of the prosecutrix, about the incident. Hariram on the same day at 3.30 P.M. went to Police Station Frazerpur, situated about two kilometers away, along with the prosecutrix who lodged F.I.R. Ex.P.6. In the F.I.R., the name of appellant-Kirtiwas was not mentioned. He was referred to as an unknown boy of the some locality i.e. Patelpara. The prosecutrix was sent for medical examination on 12.7.2000. Dr. Smt. S. Pandey P.W.11 examined the prosecutrix but did not find any injury either external or on her private parts. She found an old tear in the hymen. The vagina admitted one finger. No symptoms of rape were found on the prosecutrix. Her vaginal slides were prepared and sealed which was seized vide Ex.P.32 on 13.7.2000. On the same day one brown chocolate coloured "V" shaped old nylon elastic underwear was seized vide Ex.p.3 from the prosecutrix. On 14.7.2000 the appellants-Bhuvneshwar and Vijay were arrested vide Ex.P.16 & Ex.P.17. On the same day one sky blue coloured 'Lux underwear' was seized from appellant Bhuvneshwar and one yellow coloured "Kaliya 30" underwear was seized from appellant-Vijay vide Exs.P.4 & P.5. Both the underwears were examined by Dr. V.K.Jha P.W.8 Assistant Surgeon, Govt. Hospital, Jagdalpur who found some stains on the underwears seized from the appellants vide Exs.P.4 & P.5. He sealed both the

(34)

underwears and advised for chemical analysis of the stains to ascertain the presence of semen.

5. On 12.09.2000 vide memo No.56 Ex.P.21, the underwear of the prosecutrix, her vaginal slides and the underwears seized from the appellants-Bhuvneshwar and Vijay were sent for chemical analysis to the Forensic Science Laboratory for confirmation of semen and human spermatozoa. Vide report dated 21.6.2001 Ex.P.22, presence of semen and human spermatozoa was confirmed on all the above mentioned articles.

6. Appellants-Vijay and Bhuvneshwar were sent for medical examination on 14.7.2000. On examination, Dr. Virendra Kumar Jha P.W.8 found that smegma was present on the glans penis of both appellants Vijay and Bhuvneshwar. No external injury was found on their person. Vide Ex.P.9 and P.11, he opined that he could not say that the appellants-Bhuvneshwar and Vijay could not perform sexual intercourse.

7. The school admission register Ex.P.1(A) was seized from Ku. Kamolini Sawal P.W.1, Headmistress of the Primary School, Shanti Nagar which revealed that the date of birth of the prosecutrix was mentioned as 1.5.1985 at Sl.No.322. Another register Ex.P.2(A) was seized which revealed that on 4.7.1989 while admitting the prosecutrix in the school, the date of birth of the prosecutrix was informed by Daymati Yadav, mother of the prosecutrix to be 1.5.1985. For determination of the age of the prosecutrix, she was sent for ossification test. Dr. Govind Singh P.W.10 who conducted the radiological examination, found that fusion of head of radius, Olecranon process, head of humorous, head of distal end of Ulna, distal end of radius and the pelvic bone had taken place and opined that the age of the prosecutrix was between 15 - 19 years.

(35)

8. Appellant-Kirtiwas was arrested much later on 30.09.2000 vide arrest memo Ex.P.18. Tahsildar J.R.Chourasia P.W.13 held the test identification parade in the Tahsil Office vide memo Ex.P.36 and reported that the prosecutrix identified the appellant-Kirtiwas. Spot map was prepapred by Sub-Inspector Ratnesh Mishra P.W.9 vide Ex.P.13. After completion of investigation, the appellants were prosecuted. Appellants-Vijay and Bhuvneshwar were charged for offences under Sections 363, 366, 376(2)(g) 342 and 506-B I.P.C. and appellant-Kirtiwas was charged under Section 363 & 366 I.P.C. The appellants abjured the guilt, pleaded innocence and false implication and examined Smt. Sunita Shukla D.W.1, Reader of Tahsildar, Ku. Savita Markam D.W.2 Patwari who were present during identification. They also examined Gangaram D.W.3, Gopal D.W.4 and Anil Kumar D.W.5 to create an alibi for the appellants Vijay and Bhuvneshwar by showing that on 12.7.2000 they were present in the village Panchayat at the time of occurrence. Gangaram D.W.3, father of the appellant-Vijay stated that he had pledged one acre agricultural land with Hariram Yadav, father of the prosecutrix, for Rs.16,000/-. After returning the amount of Rs.16,000/- vide receipt Ex.D.3, he asked Hariram P.W.3 to return the documents of pledge, but Hariram refused. Hariram had also threatened him for which a report was lodged vide Ex.D.4 at P.S. Parpa Frazerpur. It was thus contended that the appellants were falsely implicated.

9. It was also contended in the alternative during arguments by defence before the trial Judge that it could not be ruled out that the act of sexual intercourse, if any, by the appellants Vijay and Bhuvneshwar with the prosecutrix was with her consent. The learned trial Judge negatived the contentions raised by the defence *in toto* and relying upon the evidence of prosecutrix P.W.5, Jaishree P.W.6,

(36)

Pradeep P.W.7, Hariram P.W.3 and also the evidence of Ku. Kamolini Sawal P.W.1, Headmistress of Primary School, Shanti Nagar, convicted and sentenced the appellants as mentioned in para 1.

10. Shri Prafulla Bharat, learned counsel for the appellants has assailed the impugned judgment firstly on the ground that considering the ossification test report Ex.P.31 and bearing in mind the legally permissible margin of error of two years on either side, it could not be ruled out that the prosecutrix was above 18 years of age at the time of occurrence. He also contended that the primary evidence of proof of age i.e. Kotwari Register had not been proved. The school admission register merely showed that Daymati Yadav who was not examined by the prosecution had given the date of birth of the prosecutrix as 1.5.1985 while admitting her in the school on 4.7.89 i.e. at the age of 4 years. He further contended that the school admission register Ex.P.2(A) revealed that at Sl.Nos.322, 323, 324 and 325 the date of birth of Ku. Purnima, Ku. Tomeshwari, Sukhdas and Ku. Phulmati was informed on the same day by Daymati Yadav while Ku. Purnima alone was her daughter. Learned counsel for the appellants argued that the date of birth as mentioned in Ex.P.2(A) was nothing but the guess work of Daymati Yadav as was demonstrated by the report of ossification test Ex.P.31 and the evidence of Dr. Govind Singh P.W.10 who stated that process of fusion of all the bones of the prosecutrix had completed meaning thereby that the prosecutrix was a girl above 18 years of age.

11. Learned counsel for the appellants further contended that the testimony of the prosecutrix that she was physically lifted by the appellants-Vijay and Kirtiwas and taken to a distance of one kilometer was highly exaggerated. He further referred to the testimony of prosecutrix in para 12 that upon hearing shouts of Jaishree who stood

(37)

outside the house of the appellant-Bhuvneshwar that "brother is coming", the appellants ran away, indicated that the prosecutrix had gone to the house of the appellant-Bhuvneshwar of her own volition. It was also contended that the fact that Jaishree P.W.6 did not shout or raise an alarm and quietly stood outside the house till she saw her brother also negatived the story of rape. Learned counsel for the appellants also argued that the presence of smegma on the glans penis of the appellants-Vijay and Bhuvneshwar on 14.7.2000 at around 10.00 P.M. clearly negatived any sexual intercourse by the appellants-Vijay and Bhuvneshwar on the prosecutrix. So far as the report of F.S.L. Ex.P.22 was concerned, learned counsel for the appellants contended that Serological Examination was not done to confirm presence of the semen of the appellants-Vijay and Bhuvneshwar either on the vaginal slides or on the underwear of the prosecutrix. It was also argued that a perusal of the spot map prepared by Sub-Inspector Ratnesh Mishra vide Ex.P.13 clearly revealed that the place of occurrence is nowhere in between the school and the house of the prosecutrix. If the prosecutrix while going from her house marked "D" in the map to the school marked "C" had returned from half way down, she would have never taken the way to the burial ground. The place "A-1" where the appellants are alleged to have caught the prosecutrix is nowhere in the route to be taken by the prosecutrix for returning home. Her testimony that while she was returning home on the road near the burial ground, the appellants-Vijay and Bhuvneshwar were standing, on being compared with the map Ex.P.13 shows that the prosecutrix had taken the route which went straight to the house of the appellant-Bhuvneshwar. So far as the appellant-Kirtiwas is concerned, it was argued that he was implicated falsely. In the test identification report Ex.P.36 it was not stated as to how the appellant was identified

(38)

by the prosecutrix. The testimony of Tahsildar J.R.Chourasia P.W.13 also did not show that the prosecutrix was asked to identify the person who had lifted her and taken her to the house of the appellant-Bhuvneshwar. In sum and substance, it was contended that the evidence led by the prosecution failed to establish the guilt of the appellants-Vijay and Bhuvneshwar for offences under Section 363, 366, 376(2)(g) and 342 and also under Section 363 & 366 I.P.C. against the appellant-Kirtiwas. So far as the evidence of alibi led by the appellants in defence is concerned, learned counsel for the appellants did not place any reliance thereon during arguments.

12. On the other hand, Shri U.K.S.Chandel, learned Panel Lawyer while arguing in support of the impugned judgment contended that presence of semen and spermatozoa on the vaginal slides of the prosecutrix as also on the underwear of the prosecutrix and the appellants-Vijay and Bhuvneshwar was indicative of the fact that the testimony of the prosecutrix was reliable that she was subjected to sexual intercourse by the appellants-Vijay and Bhuvneshwar one after the other. It was further contended that there was nothing to disbelieve the testimony of Ku. Kamolini Sawal, Headmistress of Primary School, Shanti Nagar P.W.1 and the entry in school admission register clearly established that the age of the prosecutrix was less than 16 years on the date of occurrence. It was argued that the evidence of the prosecutrix P.W.5 was trustworthy and wholly corroborated by Jaishree P.W.6, Pradeep P.W.7 and Hariram P.W.3.

13. Having heard the rival contentions, I have perused the record. The learned trial Judge held that the age of the prosecutrix was below 16 years for the purposes Section 376 I.P.C. and below 18 years for the purposes of Section 363 I.P.C. Heavy reliance was placed by the learned trial Judge upon the testimony of Ku. Kamolini Sawal,

(89)

Headmistress, Primary School, Shanti Nagar P.W.1. This witness was posted at the Primary School Shanti Nagar as Headmistress on 25.3.1992. She produced the school admission register Ex.P.1(A) and the register containing the information given by the parent relating to the date of birth of the child who was to be admitted in the school. A perusal of Ex.P.2(A) clearly shows that on 4.7.1989 Daymati Yadav, the mother of the prosecutrix had informed the date of birth of the prosecutrix to be 1.5.85 without producing any document to substantiate the same. It also appears that on the same day Daymati Yadav had admitted Ku. Tomeswari, Sukhdas and Ku. Phoolmati in the school and had also informed their date of birth as 3.5.85, 12.4.83 and 15.12.80.

14. It is settled law that the primary evidence relating to the proof of the date of birth is the information given by the parents after the birth of the child to the Kotwar in the village. No efforts were made to ascertain the date of birth of the prosecutrix from the Kotwari register or to produce it in the Court. Ku. Kamolini Sawal P.W.1 stated that in both registers there was no declaration by the parent relating to the date of birth of the child although such declaration is taken from the parent at the time of admission of the child. It is thus clear that the primary evidence relating to proof of age has not been produced by the prosecution to establish the age of the prosecutrix and the entry in the school admission register showing date of birth of the prosecutrix as 1.5.85 was nothing but a mere estimation or guess work of the mother of the prosecutrix because while admitting 4 children of different parentage in school on that day she gave out their date of birth. Pradeep P.W.7, brother of the prosecutrix stated that he was aged 18 years and the prosecutrix was two years younger

(46)

to him which also renders the entry in the school register Ex.P.1(A) wholly unreliable.

15. The testimony of Dr. Govind Singh P.W.10 and the ossification test report Ex.P.31 clearly shows that fusion of all bones of the prosecutrix had taken place. In the opinion of Dr. Govind Singh, the age of the prosecutrix was between 15 to 19 years. It is settled law that the legally permissible margin of error of two years on either side has to be taken into consideration while considering the ossification test report. The medical examination report Ex.P.35 of the prosecutrix proved by Dr. Smt. S. Pandey P.W.11 also shows that the prosecutrix had an old vaginal tear and was fully habitual of sexual intercourse. In view of the above findings and the legally permissible margin of error of two years on either side, and in the absence of any primary evidence regarding proof of age of the prosecutrix, it cannot be ruled out that the age of the prosecutrix on the date of occurrence was 18 years or above.

16. The prosecutrix P.W.5 has stated that at about 10.00 A.M. when she left with her sister Jaishree P.W.6 for the school, it started to rain. Finding lot of mud she decided against going to the school and was returning home. Near the burial ground she found that the appellants Vijay and Bhuvneshwar were standing. As they went ahead, the appellant-Bhuvneshwar came from behind and holding her hand gagged her mouth. Vijay caught hold of Jaishree and threatened that if they shouted he would kill them. At that point of time, another boy unknown to the girls (appellant-Kirtiwas) came and held her.

17. She further deposed that while both the appellants-Bhuvneshwar and Kirtiwas physically lifted her, the appellant-Vijay lifted Jaishree and took them to the house of Bhuvneshwar situated

(41)

about one kilometer away. After taking her there, the appellant-Kirtiwas went away from there. Nowhere in the testimony of the prosecutrix or Jaishree P.W.6 it appears that they had seen the appellant-Kirtiwas standing with the appellants-Vijay and Bhuvneshwar near the burial ground. From where the appellant-Kirtiwas came and for what purpose remains a mystery which could not be unfolded by the prosecution. The testimony of the prosecutrix P.W.5 and Ku. Jaishree P.W.6 clearly shows that the appellant-Kirtiwas did not even enter the house of Bhuvneshwar. Ku. Jaishree P.W.6 has stated that after taking her and the prosecutrix outside the house of Bhuvneshwar, all the three appellants left them and while the appellants-Bhuvneshwar and Vijay took the prosecutrix inside, the third boy i.e. the appellant-Kirtiwas went away. Since it is not shown that the appellant-Kirtiwas was standing with the appellants-Vijay and Bhuvneshwar on the road near the burial ground, the participation of Kirtiwas in the alleged crime appears to be extremely doubtful and not in consonance with natural human conduct because it is not alleged that he made any effort either to outrage the modesty of Jaishree or the prosecutrix.

18. Prosecutrix P.W.5 has in cross-examination paragraph 9 stated that the appellants-Vijay and Bhuvneshwar each committed rape thrice on her. In paragraph 9 she has stated that after taking her inside the house, Bhuvneshwar had undressed her and thereafter making her lie on the cot and after gagging her mouth with a handkerchief Bhuvneshwar committed rape on her. She did not state that while the appellant-Bhuvneshwar was undressing her or while he was undressing himself she had shouted. The prosecutrix did not mention about the role played by the appellant-Vijay during the sexual act by the appellant-Bhuvneshwar. Similarly, the prosecutrix has

(42)

stated that when Vijay was committing rape on her, appellant-Bhuvneshwar was also inside the room. She admitted that she had attempted to bite and scratch the appellants and had offered stiff resistance. However, medical evidence of Dr. Smt. S. Pandey does not show that there was any external injury on the person of the prosecutrix. Not only this, no injury whatsoever was found on the private parts of the prosecutrix. Dr. Smt. S. Pandey P.W. 11 found an old tear in the hymen and opined that she was fully accustomed to sexual intercourse. The testimony of the prosecutrix that she was ravished thrice one after the other by each appellant despite stiff resistance offered by her is thus rendered unworthy of credit.

19. Ku. Jaishree P.W.6, a student of class-7th, has stated that the appellants-Vijay and Bhuvneshwar had left her outside the house of Bhuvneshwar. She has stated that she did not shout till she saw the elder brother of the prosecutrix come that way and upon hearing her shouts, the appellants-Vijay and Bhuvneshwar ran away. The prosecutrix has in para 12 of her testimony also admitted this fact by stating that her sister Jaishree had loudly shouted "brother is coming" whereupon the appellants-Vijay and Bhuvneshwar dressed and ran away. This conduct of Jaishree P.W.6 in not raising an alarm till she saw the elder brother of the prosecutrix coming also creates a serious dent in the prosecution story because Jaishree P.W.6 was absolutely free outside the house of appellant-Bhuvneshwar and could have run to inform the villagers working in the nearby fields or at the school in the Panchayat Bhawan or atleast could have raised an alarm. The appellant-Kirtiwas was also not with her and had allegedly left immediately after the prosecutrix was taken inside the house by appellants-Vijay and Bhuvneshwar.

(43)

20. It is also strange to note that although the prosecutrix is alleged to have been taken by the appellants-Vijay and Bhuvneshwar inside the house of the appellant-Bhuvneshwar, yet no family member was present in the house. Appearance of Pradeep P.W.7, the elder brother of the prosecutrix is also very dramatic. In paragraph 4 of his testimony, he stated that he heard the shouts of Jaishree from a distance of about 100 feet and recognized her and immediately went to the house of Bhuvneshwar. However, according to Jaishree P.W.6 and the prosecutrix P.W.5 when the prosecutrix came out of the house of appellant-Bhuvneshwar, after dressing, appellants-Vijay and Bhuvneshwar were not present there and had ran away. If the testimony of the prosecutrix that hearing the shouts of Jaishree the appellants had dressed and then ran away is to be believed, then Pradeep P.W.7 would have definitely seen the appellants Vijay and Bhuvneshwar running away from the house while Jaishree P.W.6 was sitting outside and shouting. Nothing of this sort happened.

21. The conduct of Pradeep P.W.7 upon reaching the spot is also most unnatural and does not inspire confidence. As an elder brother of the prosecutrix if upon hearing shouts of Jaishree he had immediately reached the spot, he would have seen the appellants Vijay and Bhuvneshwar running away or if one of the appellants was inside the house would have grabbed him then and there and would have raised all kinds of hue and cry and might also have thrashed him. However, Jaishree P.W.6 stated that after the appellants ran away, the prosecutrix came out of the house and told Pradeep P.W.7 that appellants-Bhuvneshwar and Vijay had caught of her hand while she was struggling and upon hearing this, Pradeep asked them to go home whereupon she returned home with the prosecutrix. The prosecutrix also stated in paragraph 3 that after wearing her clothes when she

(44)

came out of the house, her brother also arrived at the same time and she informed Pradeep the entire story whereupon Pradeep asked both of them to go home saying that he would be following them. The above testimony is sharply contradicted by Pradeep P.W.7 who has stated in paragraph 4 that on hearing the shouts of Jaishree when he reached the house of appellant-Bhuvneshwar, he found that Bhuvneshwar was present inside the house. There is nothing in the testimony which would show that he either caught hold of Bhuvneshwar, quarrelled with him or beat him which would have been a natural human conduct of an elder brother of the prosecutrix who was ravished. On the contrary Pradeep P.W. 7 stated that he asked the two girls to go home and went in search of the appellants. If the appellant-Bhuvneshwar was present inside the house when Pradeep P.W.7 reached the place of occurrence on hearing the shouts of Jaishree, it remains a mystery as to why did Pradeep P.W.7 state that he went in search of both appellants Vijay and Bhuvneshwar and if it is to be believed that the appellant Bhuvneshwar was inside the house what had happened to appellant-Vijay? Pradeep P.W.7 has stated that the prosecutrix had told him that the appellant Vijay had gagged her mouth with a handkerchief and thereafter along with Bhuvneshwar, Vijay had committed rape on her one after the other. However, the testimony of the prosecutrix or Jaishree P.W.6 does not show that any such statement was made by them to Pradeep P.W.7. Daymati Yadav, mother of the prosecutrix to whom the incident was narrated by the prosecutrix was not examined by the prosecution, though cited as a witness.

22. The spot map Ex.P.13 prepared by Sub-Inspector Ratnesh Mishra P.W.9 also renders the testimony of the prosecutrix unworthy of credit. The spot map shows that the house of the prosecutrix is

(45)

situated at a long distance in the opposite direction from where she was alleged to have been caught by the appellants which place is shown as "A-1". From "A-1" the place of occurrence i.e. the house of the appellant-Bhuvneshwar is diagonally in opposite direction to the house of the prosecutrix. For coming to the house of the appellant-Bhuvneshwar from place "A-1" one has to travel through the road near the burial ground. Upon minutely perusing the testimony of the prosecutrix P.W.6, I find that she has stated that since it started raining she decided to return home and was on the road near the burial ground when she found the appellants-Vijay and Bhuvneshwar standing. If we look at the map Ex.P.13, it would mean that the prosecutrix was heading towards the house of the appellant-Bhuvneshwar and not towards her own house because if she was returning home from place "A-1" the burial ground would not have fallen on way at all. This also renders the testimony of the prosecutrix doubtful.

23. The prosecutrix has admitted that at the time of occurrence the villagers were working in the field. Jaishree P.W.6 has also stated in paragraph 5 that being the harvesting season all the villagers were working in the fields. She also admits that near the place of occurrence the school was situated and was open on that day. The prosecutrix P.W.5 has also admitted in paragraph 8 that the classes were on in the school at Panchayat Bhawan at the time when the appellants Bhuvneshwar and Kirtiwas lifted her and the appellant Vijay lifted Jaishree and took them in that condition to a distance of about one kilometer. This testimony is untrustworthy that the two girls were physically lifted and taken to a distance of one kilometer in broad day light and yet were not seen by any villager. As stated earlier, the role of appellant-Kirtiwas in the entire incident is highly

(46)

doubtful. If the appellants wanted to ravish the prosecutrix or her sister and had physically lifted and taken them to a distance of one kilometer, then why did the appellant-Kirtiwas not even enter the house of the appellant-Bhuvneshwar and left without doing anything. If such was the intention of the appellants, why Jaishree, a girl of about 14 years age, was left alone by the two appellants outside the house. To reiterate it is also beyond comprehension why Jaishree did not raise an alarm while being left alone outside the house of the appellant-Bhuvneshwar till she saw her brother.

24. The incident is alleged to have occurred on 12.07.2000 at about 10.45 A.M. The appellants-Vijay and Bhuvneshwar were alleged to have been arrested on 14.7.2000 at 11.30 P.M. A clear interpolation is seen in the arrest memo Ex.P.16 and P.17 which show that the appellant Bhuvneshwar was arrested on 13.7.2000 on 11.30 P.M. and the appellant-Vijay was also arrested on 13.7.2000 on 11.30 P.M. by Sub-Inspector Ratnesh Mishra. There is clear interpolation in the date in Ex.P.16 and Ex.P.17 and also in the date below the signature of Sub-Inspector Ratnesh Mishra in Ex.P.17. Both the appellants-Vijay & Bhuvneshwar were subjected to medical examination by Dr. V.K.Jha P.W.8 on 14.7.2000 and presence of smegma on glans penis of appellants Vijay and Bhuvneshwar was confirmed by Dr. V.K.Jha P.W.8 which clearly contradicted the testimony of the prosecutrix that she was ravished thrice by each appellant Bhuvneshwar and Vijay despite stiff resistance by her. In Modi's Jurisprudence and Toxicology, it has been mentioned that the smegma accumulates on the glans penis if no bath is taken for 24 hours. The presence of smegma on the glans penis is a strong circumstance against sexual intercourse especially where the prosecutrix is alleged to have been ravished thrice by each appellant one by one at the same time. In a case of gang rape of this

(47)

character, it was most unlikely that smegma would be present on the glans penis of the ~~prosecutrix~~ appellants. It is true that to constitute the offence of rape, it is not necessary that there should be complete penetration of the penis with emission of semen and rupture of hymen. Partial penetration within the Labia Mazora or vulva with or without emission of semen is sufficient to constitute the offence of rape. In this case where the prosecutrix is alleged to have been ravishied by two young boys aged about 18 and 19 years repeatedly thrice one by one, the presence of smegma on the glans penis of both the appellants-Vijay and Bhuvneshwar is a strong circumstance consistent with the innocence of the appellants.

25. Shamsingh P.W.2 has stated that on the date of occurrence Jaishree was being taken to the Pandripani school for admission along with Purnima. However, the prosecutrix has contradicted this statement in paragraph 7 by stating that since there was no one to accompany her to the school Jaishree had accompanied her for going to the school on the date of occurrence. The presence of Jaishree at the place of occurrence thus appears to be doubtful. If she was sent to the Pandripani school with the prosecutrix for admission some elder member of the family would have accompanied her.

26. Hariram Yadav P.W.3, father of the prosecutrix, is the Naib Nazir in the sessions Court at Jagdalpur. In paragraph 5, firstly he denied that Gangaram, father of the appellant-Vijay, had pledged his agricultural land for Rs.16,000/- with him. This shows that there was an effort of suppressing the truth by this witness because in the next breath he admitted that Gangaram had pledged his agricultural land for Rs.16,000/- with him before the date of occurrence and had got a document executed that he would not sell the lands to any other person. Shamsingh P.W.2 has also admitted in cross-examination

(48)

paragraph 3 that Gangaram had pledged his lands with Hariram prior to the occurrence. Gangaram has been examined as a defence witness No.3 by the appellants and stated that he returned Rs.16,000/- to Hariram Yadav and had asked for his original agreement written on a stamp paper but Hariram had not returned the original document to him and had executed a receipt Ex.D-3. Due to this Hariram bore grudge against Gangaram and had therefore falsely implicated his son Vijay and Bhuvneshwar. He has also filed a copy of the report lodged by him at the Police Station Ex.D.4 relating to threats given by Hariram Yadav which shows that Hariram Yadav was using his influence as a Court employee against him. In the light of the facts and circumstances mentioned above, the possibility that the appellants were falsely implicated could also not be ruled out.

27. The appellant-Kirtiwas was arrested on 30.09.2000 vide Ex.P.18 i.e. after a long delay of about two and half months. There is no explanation for this delay. So far as the test identification conducted by Tahsildar J.R.Chourasia P.W.13 is concerned, neither the report Ex.P.36 nor his testimony shows as to in what manner the prosecutrix had identified the appellant-Kirtiwas. Ex.P.36 merely shows that the prosecutrix had kept her hand over the head of Kirtiwas during identification but it does not show that the prosecutrix had identified the appellant-Kirtiwas as the person who had physically lifted and taken her to the house of Bhuvneshwar on the date of occurrence. No reason is assigned by the prosecution as to why Jaishree P.W.6 who had accompanied the prosecutrix at the time of occurrence was not called to identify the culprit. As stated earlier, presence of appellant-Kirtiwas at the time when the prosecutrix and Jaishree were way laid by the appellants is highly doubtful. The act attributed

(49)

to the appellant Kirtiwas is not in consonance with the natural human conduct.

28. The report dated 21.6.2001 of the F.S.L. Ex.P.22 confirmed the presence of semen and human spermatozoa on the vaginal slides and *chaddi* of the prosecutrix and also on the underwears seized from the appellants-Vijay and Bhuvneshwar. However, since the stains were not subjected to serological examination, it cannot be said beyond the shadow of doubt that the semen and human spermatozoa on the vaginal slides and underwear of the prosecutrix were of the appellants-Vijay and Bhuvneshwar.

29. Having thus considered the evidence led by the prosecution in its entirety, the following facts emerge:

(A) Primary evidence relating to proof of age was not produced by the prosecution. The testimony of Pradeep P.W.7 clearly showed that the age of the prosecutrix as entered in the admission register was false. Besides, ossification test report Ex.P.31 did not rule out the possibility that the prosecutrix was above 18 years of age on the date of occurrence.

(B) The testimony of the prosecutrix that she was ravished by the appellants-Vijay and Bhuvneshwar thrice one after the other despite stiff resistance is unreliable since not corroborated by the medical evidence.

(C) Her testimony that the appellants-Vijay, Bhuvneshwar and Kirtiwas physically lifted her and Jaishree P.W.6 and took them in broad day light to a distance of about one kilometer upto the house of Bhuneshwar also does not inspire confidence.

(D) The presence of the appellant-Kirtiwas at the place of occurrence is extremely doubtful since despite the allegation

(50)

that he appeared from nowhere and assisted the appellants-Vijay and Bhuvneshwar in lifting the two girls and bringing them to a distance of one kilometer to the house of Bhuvneshwar, he is alleged to have made no attempt to even outrage the modesty of either girl and left the house of Bhuvneshwari immediately thereafter.

(E) Identification report Ex.P.31 of appellant-Kirtiwas is of no consequence since the appellant-Kirtiwas was arrested after a considerable delay of two and half months and the identification memo Ex.P.31 did not show that the prosecutrix had identified the appellants-Kirtiwas as the person who had assisted the appellant-Vijay and Bhuvneshwar in lifting her and bringing upto the house of appellant-Bhuvneshwar. The test identification also loses its value since the appellant-Kirtiwas was not subjected to identification by Ku. Jaishree P.W.6.

(F) The spot map Ex.P.13 contradicts the testimony of the prosecutrix that she was returning home and suggests that she was heading towards the house of the appellant-Bhuvneshwar.

(G) The testimony of the prosecutrix in para 12 is duly corroborated by Jaishree P.W.6 in para 6 that upon hearing shouts of Jaishree that "brother was coming" the appellants ran away and creates a strong suspicion in the story of alleged rape on the prosecutrix by the appellants Vijay and Bhuvneshwar.

(H) Neither the prosecutrix nor Jaishree deposed that they had specifically narrated the fact of rape by appellants Vijay and Bhuvneshwar to Pradeep P.W.7.

(I) The presence of smegma on the glans penis of the appellants Vijay and Bhuvneshwar upon medical examination by

(51)

Dr. V.K.Jha P.W.8 also renders the testimony of the prosecutrix that she was ravished thrice by each appellant one after the other despite stiff resistance by her, unworthy of credit.

(J) The testimony of the prosecutrix that she offered stiff resistance to the appellants and made efforts to scratch and bite them during the repeated rape thrice by each appellant is also rendered doubtful in view of the fact that no external injury was found on the appellants-Vijay and Bhuneshwar. The prosecutrix was alleged to have been gang raped thrice after being undressed completely yet no external injury or injury on her private parts was found by Dr. Smt. S. Pandey P.W.11.

(K) The admission of Hariram P.W.3 and Shamsingh P.W.2 and the testimony of Gangaram D.W.3 goes to show that Hariram, the father of the prosecutrix, bore a serious grudge against Gangaram, the father of the appellant Vijay since lands had been pledged by Gangaram with Hariram and despite repayment of loan, Hariram did not return the original stamp paper to Gangaram.

(L) The report of F.S.L. Ex.P.31 did not establish the complicity of the appellants-Vijay and Bhuvneshwar in the offences of rape in the absence of the report of serological examination.

(M) The serious contradiction in the testimony of the prosecutrix P.W.5 and Jaishree on the one hand and the testimony of Pradeep P.W.7 on the other hand creates a serious doubt that the story of gang rape as narrated by the prosecutrix is false.

(52)

33. In view of the facts and circumstances mentioned above as emerging from the evidence on record, conviction of the appellants-Vijay and Bhuvneshwar under Sections 363, 366, 376(2)(g) and 342 I.P.C. and the sentence awarded thereunder as also the conviction of Kirtiwas under Section 363 & 366 I.P.C. and the sentence awarded thereunder are liable to be set aside.

34. In the result, Criminal Appeal No.1004/2001 preferred by the appellant Kirtiwas and Criminal Appeal No.1021/2001 preferred by appellants-Vijay and Bhuvneshwar are allowed. Conviction of the appellants-Vijay and Bhuvneshwar under Sections 363, 366, 376(2)(g) and 342 I.P.C. and the sentence awarded thereunder as also the conviction of Kirtiwas under Section 363 & 366 I.P.C. and the sentence awarded thereunder are set aside. The appellants are acquitted of all the charges and shall be set at liberty forthwith, if not required in any other case. Fine if paid shall be refunded.

Sd/-
Dilip Raosaheb Deshmukh
Judge

Anjani